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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GUSTAVO PIMENTEL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a trial court determine that a criminal defendant is "in custody" for Miranda purposes by considering the police officers' subjective beliefs that he was the "focus of the investigation"? This question is nearly identical to one recently decided by this Court on April 26, 1994, in Stansbury v. California, 93-5770, 1994 U.S. LEXIS 3293.

2. May a trial court exclude a statement made by a criminal defendant after he was advised of and waived his Miranda rights because it was the tainted product of an earlier non-Mirandized statement?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One, issued on December 20, 1993.

OPINION AND ORDER BELOW

The opinion of the California Court of Appeal, Fourth Appellate District,

Division One, is unpublished, and appears herein in Appendix A.

The order of the Supreme Court of California denying Petitioner's Petition for Review appears in Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under title 28, U.S.C. § 1257(3) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division One, which was entered on December 20, 1993. The California Supreme Court denied review in this case on March 24, 1994.

This Petition for Writ of Certiorari is filed within the required 90-day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on March 24, 1994. Market Street Railroad Co. v. Railroad

Commission, 324 U.S. 548, 550-552, (1994). Thus, the instant judgment is a final decision rendered by the highest court of California interpreting rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On December 4, 1991, the District Attorney of San Diego County, California, filed a consolidated information against

Respondent charging him with the murder of Luis Coronado on June 29, 1991, in violation of California Penal Code section 187, subdivision (a), alleging Respondent was armed with a firearm, within the meaning of California Penal Code section 12022, subdivision (a)(1). CT 17.[1/]

A jury found Respondent guilty of second degree murder, and found true the allegation that he was armed with a firearm during the commission of the murder. CT 41, 165, 168.

On April 16, 1992, the court sentenced Respondent to 15 years to life for second degree murder and added one year for the firearm enhancement. CT 135-136, 170.

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1. "CT" refers to the Clerk's Transcript of the trial court's documents and orders. "RT" refers to the Reporter's Transcript of the trial court proceedings. Both documents were included as part of the official record on appeal before the California Court of Appeal and the California Supreme Court.

On December 20, 1993, the court of appeal reversed the murder conviction on the ground that Respondent's non-Mirandized and Mirandized statements to police should have been excluded because he was not advised of his Miranda rights while in custody. App. A at A-2. On March 24, 1994, the California Supreme Court denied Petitioner's Petition for Review. App. B. Remittitur issued on April 21, 1994. App. C.

HOW THE FEDERAL QUESTION IS PRESENTED

At a pre-trial evidentiary hearing in the San Diego County, California, Superior Court, Respondent moved to suppress statements made by him to police during police station interviews. He claimed the police subjected him to a custodial interrogation without first advising him of his Miranda rights. CT 143-145; I RT 123. The trial court denied Respondent's motion to suppress the statements, ruling

that the police officers' non-Mirandized interview of Respondent was a non-custodial questioning which did not require a Miranda warning. CT 145; I RT 123-124.

The California Court of Appeal, Fourth Appellate District, Division One, reversed Respondent's conviction for murder, holding that his statements should have been excluded. App. A at A-2. It held that Respondent had been subjected to custodial interrogation when he "became the focus of the investigation" during a non-Mirandized interview. App. A at A-17, A-18. The court further held that Respondent's subsequent Mirandized statements should have been suppressed, since they were the tainted product of the earlier non-Mirandized statements. App. A at A-19.

Petitioner filed a Petition for Review to the California Supreme Court,

arguing that the court of appeal had erred by 1) applying a subjective factor -- focus of the investigation -- to its determination of whether Respondent was in custody for purposes of Miranda, and 2) holding that subsequent Mirandized statements were inadmissible as tainted products of the earlier non-Mirandized statements, contrary to federal law. The California Supreme Court denied Petitioner's request for review. App. B.

REASONS FOR GRANTING PETITION

The court of appeal decision in Pimentel is in conflict with decisions of this Court. As this Court stated in Stansbury v. California, U.S. LEXIS 3293 (1994), "Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."

This Court has repeatedly held that a subjective factor such as "focus of the investigation" is not a proper consideration in determining "custody" for purposes of Miranda. Berkhemer v. McCarty, 468 U.S. 420, 442 (1984) [82 L. Ed. 2d 317; 104 S. Ct. 3138]; Minnesota v. Murphy, 465 U.S 420, 431 (1984) [79 L. Ed. 2d 409; 104 S. Ct. 1136]; California v. Beheler, 463 U.S. 1121 (1983) [77 L. Ed. 2d 1275; 103 S. Ct. 3517]; Oregon v. Mathiason, 429 U.S. 492, 495 (1977) [50 L. Ed. 2d 714; 97 S. Ct. 711]; Beckwith v. United States, 425 U.S. 341, 347 (1976) [48 L. Ed. 2d 1; 96 S. Ct. 1612].

Furthermore, this Court has held that the fifth amendment does not require suppression of a Mirandized statement solely because the police had obtained an earlier voluntary but non-Mirandized statement from the suspect. Oregon v.

Elstad, 470 U.S. 298, 303-318 (1985) [84 L. Ed. 2d 222; 105 S. Ct. 1285].

STATEMENT OF FACTS

A. The Crime

Shortly after midnight on Friday, June 28, 1991, Luis Coronado (Big Man), a member of the Old Town National City (OTNC) street gang, fellow gang member Eddie Bellot (Eddie Boy), and Gabriel Mejia (Chito) were standing together on the corner of 16th Street and Coolidge in National City. II RT 373, 374, 79. A dark blue Monte Carlo or Regal pulled up near them. II RT 379, 380, 392, 414, 447, 459, 452. A male passenger got out of the car, walked to the rear, and asked where Coronado and his friends were from. II RT 381, 385, 453, 456. They replied that they were from "OTNC." II RT 385.

Suddenly the passenger pulled out a gun from under his shirt. II RT 386, 387, 402, 457, 458. Bellot and Coronado began running. Three to five shots were fired. II PT 386, 388, 459. Bellot heard Coronado yell his name, and when Bellot turned around, he saw Coronado lying on the ground. II RT 386, 388. The car and the shooter were gone. II RT 388, 460. Coronado died at the scene from multiple gunshot wounds. III RT 520-521, II RT 390; IV RT 653, 654, 655, 657, 659.

Respondent subsequently admitted to police that he and a fellow gang member named "Flips" (Felipe Juarez) had been involved in the altercation at the 7-Eleven the night of the shooting. Supp. CT 102, 106, 107, 110, 112-114. They had fought with some males there, left the 7-Eleven, and driven to National City to look for some OTNC gang members to fight

in order to pay them back for what had happened at the 7-Eleven. Supp. CT 102-103, 115-116, 154.

In National City they saw a group of males on the street corner, and Juarez said "Yeah, that's them." Supp. CT 114, 119, 120, 122. After an exchange of words and gang signs, Juarez got out of the car, walked to the back of the car, and fired at the three males. Supp. CT 122, 123, 103, 104, 105, 126, 127.

Felipe Juarez was also arrested for the murder of Luis Coronado. IV RT 619.

B. <u>The Motion To Exclude Respondent's Statements</u>

A pre-trial evidentiary hearing was held on Respondent's motion to exclude his statements made to police, at which Detective Boegler, Investigator Marquez, and Respondent testified and tape

recordings of the Mirandized interviews were played.

1. The July 29, 1991, Non-Mirandized Interview

At about 3 p.m. on July 29, 1991, National City Police Detective Craig Boegler and District Attorney Gang Investigator Robert Marquez went to Respondent's place of employment to photograph his vehicle, which matched a description of the suspect vehicle. I RT 25, 34, 98. A day or two earlier the officers had learned that Respondent owned a vehicle that was similar to the suspect vehicle -- a Chevrolet Monte Carlo. I RT 33.

Respondent was not a suspect in the shooting at that time, however, and the officers had no intention of speaking to him that day. I RT 32-33, 36, 103. They

only wanted to take pictures of the car and show them to witnesses. I RT 33.

While the officers were in the process of taking Polaroid photos of the car in the parking lot, Respondent came outside and asked the officers what they were doing. I RT 25, 44, 98. They advised Respondent what they were doing and why, and asked if he would mind talking to them. I RT 25-26, 103. The officers explained that the reason they wanted to talk to him was because they had information that a vehicle similar to his was used in the shooting, and that they were running down as many leads as possible. I RT 36.

Respondent was just one of several leads the officers were pursuing who "perhaps was the owner of the vehicle in question." I RT 102, 97. As Investigator Marquez said, "Mr. Pimentel was not a

suspect. We only wanted to question him about the vehicle and either to eliminate him as a possible suspect, and he -- and get more information. We were trying to run down as many leads as we possibly could." I RT 36.

Respondent agreed to talk to the officers. I RT 26, 102. Although they told him he could drive himself to the police station, he asked if they would follow him home so he could drop off his car and then ride with the police to the station. I RT 26, 99.

After arriving at the police station at about 4:30 p.m., the officers took Respondent into an interview room and began questioning him about the whereabouts of his vehicle on the night of the shooting. I RT 26-27, 101. Investigator Marquez did not take any

notes or generate a report during this interview. I RT 37.

The officers explained to Respondent that because of the type of car he owned and his knowledge about or possible affiliation with the Calle Treinta street gang, they wanted to determine his possible involvement in the homicide. I RT 35. The officers believed that the killing was basically between two gangs, Calle Treinta and Old Town National City (OTNC), and that Calle Treinta gang members might be responsible for the shooting. I RT 27, 35, 104, 106. The officers asked Respondent about his vehicle, his possible involvement with gangs and his whereabouts on the night of June 28, 1991. I RT 46, 104-105.

The officers were also interested in whether Respondent was involved in a fight at the 7-Eleven that evening, since one

theory they were exploring was the possibility that the fight at the 7-Eleven might be tied to the later shooting. I RT 105. This theory surmised that Calle Treinta gang members involved in a fight with OTNC gang members at the 7-Eleven prior to the shooting might have returned to National City and committed the shooting. I RT 105-106.

During the questioning, Detective Boegler falsely told Respondent that he had a videotape showing him and his car at the 7-Eleven that night, in order to learn whether Respondent was there or not. I RT 108, 109, 89, 90, 91.

Although initially Respondent claimed that he knew "nothing about what we were talking about," he eventually admitted that he associated with members of the Calle Treinta gang, and had been at the 7-Eleven store with fellow gang members

"Sparky" and "Smurf" a week before the shooting. I RT 27, 48, 109. At the point at which Respondent admitted that he associated with Calle Treinta gang members, Investigator Marquez thought "Hey, maybe we're on to something. In my own mind, maybe we're on to something. Maybe we're close." I RT 48.

Respondent later told Detective Boegler that he had been at the 7-Eleven on the night of the shooting, but there had been no fight. I RT 110.

At that point Respondent became a suspect in the case and was given his Miranda rights. I RT 27-28, 110. He said he understood those rights and agreed to talk to the officers. Supp. CT 5. The questioning had lasted about an hour and a half. I RT 47, 46, 103.

2. The July 29, 1991, Mirandized Interrogation

The interview began at the police station at approximately 7:15 p.m. and lasted until 8:48 p.m. I RT 45, 114; Supp. CT 2, 96. Investigator Marquez advised Respondent that because they wished to ask him more questions, they were going to advise him of his Miranda rights at that time. Detective Boegler then read Respondent his rights, and Respondent said he understood those rights and was willing to talk to the officers. Supp. CT 4-5.

Through much of the interview, Respondent variously denied that he had been at the 7-Eleven store the night of the shooting, had gone into Memorial Park the night of the shooting, or had been at the shooting scene, then he admitted his presence, and then he retracted his

admissions. Supp. CT 61-62, 69, 76-77, 79-82, 83, 85-88, 92.

Respondent ultimately told the officers that he had driven "Sparky" and "Smurf" to the shooting scene, where "Sparky" and "Smurf" shot at a group of men standing on the corner. At this point Respondent was arrested and booked into jail on one count of murder. I RT 39, 113; Supp. CT 94, 95, 96, 85-88.

3. The July 30, 1991, *Mirandized* Interrogation

After following up on information given to them by Respondent the previous day, Detective Boegler and Investigator Marquez "felt we had a pretty good picture of what had happened" and wanted to talk to him again to clear up a few things. I RT 115. The next day, July 30, 1991, Detective Boegler and Investigator Marquez

returned to the jail to reinterview Respondent. I RT 115.

The second interview was also tape recorded. I RT 40. At the commencement of this taped interview, Respondent was readvised of his Miranda rights, said he understood them, and agreed to talk to the officers. Supp. CT 99-100; I RT 40-41.

During this interview, Respondent admitted that he and Felipe Juarez had been involved in an altercation with OTNC gang members on the night of the shooting. They then drove to National City, where Juarez confronted some OTNC gang members on the corner, got out of the car, and fired shots at them.

This interview lasted a little over one hour. I RT 41; Supp. CT 156.

4. The Trial Court's Ruling

The trial court ruled that the officers' non-Mirandized interview of Respondent was "a noncustodial questioning in which the defendant was present voluntarily." I RT 123. Accordingly, no Miranda warning was required at that time. I RT 123. The court concluded:

> It was made clear that he could leave at any time he wanted to. He was not under arrest. The suspicions that they had, while focused upon the defendant, were not such that required a Miranda warning, but most importantly, he was not in custodial status. So there's no basis to suppress because of a result of Miranda.

I RT 23-124.

ARGUMENT

I

THE CALIFORNIA REVIEWING COURT FAILED TO RECOGNIZE THAT A SUBJECTIVE FACTOR SUCH AS "FOCUS OF THE INVESTIGATION" IS NOT A PROPER CONSIDERATION IN DETERMINING CUSTODIAL INTERROGATION

The court of appeal in Pimentel erroneously held, contrary to federal law, that Respondent was subject to custodial interrogation during the interview when he "became the focus of the investigation." App. A at A-17, A-18. The court reversed Respondent's conviction for murder, holding that his statements to police should have been excluded. App. A at A-2. Citing the California Supreme Court's four-factor test for determining custodial interrogation[2/], the court held that

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2. The California Supreme Court held that "the most important considerations [in determining 'custody' for Miranda purposes] include (1) the site of the interrogation, (2) whether the investigation has focused on the

Respondent had been subjected to custodial interrogation when he "became the focus of the investigation" during a non-Mirandized interview. App. A at A-17, A-18.

This holding is in conflict with federal law. This Court recently decided Stansbury v. State of California (___ U.S. ____ (April 26, 1994) [62 U.S. L. Week 4279], a case presenting a nearly identical issue -- whether a subjective factor is a proper consideration in determining custodial interrogation for Miranda purposes. In Stansbury, this Court held that "an officer's subjective and undisclosed view concerning whether

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subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." People v. Boyer, 48 Cal. 3d 247, 272 (1989); accord People v. Stansbury, 4 Cal. 4th 1017, 1050 (1993), revd. with instns. to California Supreme Court, see sub. opn. Stansbury v. California 62 U.S.L. Week at 4281.

the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody" for Miranda purposes. Stansbury v. California 62 U.S.L. Week at 4279.

Here, as in Stansbury v. California, one of the issues presented to this Court is whether a subjective factor, such as focus of the investigation, which depends in large part on police officers' subjective beliefs, should be considered in determining custody for Miranda purposes. Like Stansbury, the court of appeal in this case also relied on People v. Boyer, 48 Cal. 3d 247, in erroneously holding that Respondent was subject to custodial interrogation when he "became the focus of the investigation." As the Pimentel court here said:

> While the questioning initially related to general subjects which Pimentel could have

> responded without incriminating himself, it thereafter became much more focused. The crucial shift in questioning in our opinion came when the officers commenced falsely advising Pimentel that they had a videotape of his car at the store on June 28. At this point we believe Pimentel ceased to be simply a source of general information, or even one of several possible lead, and became the focus of the investigation. . . .
> The Miranda warning was not given until after this focused interrogation was commenced; . . . After reviewing the totality of the circumstances, as directed in Boyer[3/] (i.e., the setting at the police station, the one and one-half to two hours of interrogation before the Miranda advisement was given, and the use of false information to elicit an admission [fn. omitted]), we conclude a reasonable man in Pimentel's situation would have understood his freedom of movement had become so restricted that he was 'in custody.'

App. A at A-16 - A-17.

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3. People v. Boyer 48 Cal.3d at 272.

Under Miranda v. Arizona, (1966) 384 U.S. 436, 444, custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." While the concept of custody does not lend itself to easy definition, "the ultimate inquiry is simply whether there is a `formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, (1983) 463 U.S. 1121, 1125, quoting Oregon v. Mathiason, (1977) 429 U.S. 492, 495.

The determination of "custody" must depend on the totality of the circumstances. See California v. Beheler, 463 U.S. at 1125. Custodial status is evaluated by "how a reasonable man in the suspect's position would have understood

his situation." Berkemer v. McCarty, (1984) 468 U.S. 420, 442. Thus, courts must employ objective criteria to determine the requisite level of restraint for Miranda purposes.

In Beckwith v. United States, 425 U.S. 341 (1976), this Court repudiated the notion that the focus of suspicion translated into custody:

> Although the `focus' of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding.

Id. at 347.

In Oregon v. Mathiason, 429 U.S. at 492, this Court held that Miranda warnings are not required simply because the questioned person is one whom the police suspect:

> *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Id. at 495.

In California v. Beheler, 463 U.S. at 1121, this Court reiterated its earlier holdings that custody is not established because an individual is the focus of a criminal investigation:

> Our holding in *Mathiason* reflected our earlier decision in *Beckwith* v. *United States*, 425 U.S. 341 (1976), in which we rejected the motion that the 'in custody' requirement was satisfied merely because the police interviewed a person who was the 'focus' of a criminal investigation.

California v. Beheler, 463 U.S. at 1124, n.2.

> Although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving

> *Miranda* protection, the ultimate inquiry is simply whether there is a `formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.

California v. Beheler, 463 U.S. at 1125.

In Minnesota v. Murphy, 465 U.S. 420 (1984), this Court again repudiated a necessary connection between focus of suspicion and custody: "The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings (*Beckwith* v. *United States* 425 U.S. 341 (1976). . ." Minnesota v. Murphy, 465 U.S. at 431. In Berkhemer v. McCarty, 468 U.S. 420 (1984), this Court explicitly rejected a subjective test for determining custody. "A policeman's unarticulated plan has no bearing on the question whether a suspect was `in custody' at a particular time; the only relevant inquiry

is how a reasonable man in the suspect's position would have understood his situation." Berkhemer v. McCarty, 468 U.S. at 441-442.

While California law purports to define custody in terms of the reasonable person People v. Stansbury, 4 Cal. 4th 1017, 1050 (1993); People v. Boyer, 48 Cal. 3d 247, 272 (1989), citing Berkemer v. McCarty, 468 U.S. at 442, the California Supreme Court has included a subjective criteria -- focus of the investigation -- among one of the four factors relevant to determining custody: "[T]he most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." People v.

Stansbury, 4 Cal. 4th at 1050; People v. Boyer, 48 Cal. 3d at 272.

The California practice of including the focus of investigation as a factor in determining custody does not comport with current Miranda jurisprudence. This factor is "no longer compatible with Supreme Court precedent." United States v. Bengivenga, 845 F.2d 593, 597 (5th Cir. 1988). The objective standard of the reasonable man governs custody issues "because, unlike a subjective test, it `is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.'" Berkemer v. McCarty, 468 U.S. at 442, n.35; see United States v. Phillips, 812 F.2d 1355, 1359-60 (11th Cir. 1987).

ARGUMENT

II

MIRANDIZED STATEMENTS ARE NOT INADMISSIBLE AS TAINTED PRODUCTS OF EARLIER NON-MIRANDIZED STATEMENTS

The court of appeal ruled, contrary to federal law, that the Mirandized statements respondent made on July 29, 1991, and July 30, 1991, should be excluded because "[u]nder California law a non-Mirandized confession is presumed to taint a later Mirandized confession. [Citations.]" App. A at A-18. The court found Respondent's Mirandized statements "were inextricably" linked to the non-Mirandized statements, the court found. App. A, at A-19. As the court said:

> The statements during the first day's taped interview were part of the same continuous interrogation conducted at the same location by the same officers. The second day's [Mirandized] interview was but a continuation of the first. The

> taped post-Miranda admissions and confession were the product of the initial pre-Miranda custodial interrogation and were improperly admitted.

App. A at A-19.

The court of appeal's analysis is contrary to Oregon v. Elstad, 470 U.S. 298 (1985), wherein this Court ruled that the fifth amendment does not require the suppression of an admission made after proper Miranda warnings and a valid waiver thereof solely because the police had obtained an earlier voluntary but non-Mirandized admission from the suspect. (Id. at 303-318.) The fifth amendment prohibits the use only of compelled testimony, and failure to administer Miranda warnings creates a presumption of compulsion, requiring exclusion of the non-Mirandized statements. (Id. at 306-307.)

Elstad held that the Miranda presumption does not require that fruits of otherwise voluntary statements be excluded as inherently tainted, however. It is an unwarranted extension of Miranda to hold that simple failure to administer Miranda warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective. (Id. at 304-309.) As this Court said in Elstad: "Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (Id. at 309.)

> [A]bsent deliberately coercive or improper tactics in obtaining the initial [non-Mirandized] statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

Oregon v. Elstad, 470 U.S. at 314.

The court of appeal in Pimentel did not analyze the admissibility of Pimentel's Mirandized statements under controlling federal law as set forth in Oregon v. Elstad. Rather, it erroneously concluded that since "under California law a non-Mirandized confession is presumed to taint a later Mirandized confession," and the subsequent Mirandized statements were all part of the same continuous interrogation begun with the non-Mirandized statements, all the statements,

Mirandized or not, should have been excluded. App. A at A-18, A-19. The court did not consider whether Pimentel's subsequent Mirandized statements were made knowingly and voluntarily[4], as directed by Elstad.

The Pimentel court erred in holding that Pimentel's Mirandized statements should be excluded because they were the tainted product of his non-Mirandized statements. Application of federal law under Oregon v. Elstad compels the admission of the Mirandized statements, since they were knowingly and voluntarily made.

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4. In denying appellant's motion to exclude his statements on the ground they were coerced and involuntarily, the trial court found there was no evidence to indicate the statements were coerced or involuntarily. I RT 124.

CONCLUSION

Accordingly, for the reasons stated, Petitioner respectfully asks that the petition for certiorari be granted to review the decision of the California Court of Appeal in this case and that this Court reverse and remand it back to the Court of Appeal with directions to reconsider in light of Stansbury v. California.

DATED this 12th day of May, 1994

Respectfully submitted,

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APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[Filed December 20, 1993]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	D016597
v.	(Super. Ct. No. CR125354)
GUSTAVO PIMENTEL,	
Defendant and Appellant.	OPINION

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Reversed.

A jury convicted Gustavo Pimentel (Pimentel) of murder in the second degree of Luis Coronado (Coronado) (Pen. Code,[1] § 187, subd. (a)) and found Pimentel had been personally armed with a firearm (§

1. All code references are to the Penal Code unless otherwise specified.

been personally armed with a firearm (§ 12022, subd. (a)(1)). The trial judge sentenced Pimentel to a total term of 16 years to life.

Pimentel contends his admissions to interrogating officers should have been excluded at trial. He also raises several claims of instructional error. We conclude reversal is required on the first ground: Pimentel's admissions to interrogating officer should have been excluded because the officers subjected him to a custodial interrogation without first advising him of his Miranda[2/] rights. We find no error in the various instructions given, or refused, by the court.

FACTUAL BACKGROUND

Coronado's killing was the result of rivalry and animosity between the Logan

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2. Miranda v. Arizona (1966) 384 U.S. 436, 479.

Heights Calle Treinte (Calle Treinte) and the Old Town National City (OTNC) street gangs.

OTNC gang members 16-year-old Enrique Diaz (Diaz) and 15-year-old Rudy Cedano (Cedano) testified that at about 10 or 10:30 p.m. on June 28, 1991, they drove, with Miguel Mejia, another youth and two girls, to the 7-Eleven store at 24th and Highland in National City where they planned to steal beer. Diaz and Cedano said while they were in the store two young men entered and identified themselves as Calle Treinte members. The youths entered the store and began fighting; then the Calle Treinte members ran to their car and drove away. Diaz described the car as a metallic blue Buick Regal or Chevrolet Monte Carlo or Oldsmobile, and identified Pimentel's car as the one he saw. Although Diaz and Cedano were unable to identify Pimentel

from a photographic lineup, at trial they identified him as the driver of the car.

Former Calle Treinte gang member Javier Aguirre (Aguirre) testified that at about 12:30 a.m. the following day, he and Calle Treinte member Jerry Ortega (Ortega) drove in Aguirre's 1983 Blue Monte Carlo to the same 7-Eleven store to buy alcohol. He said that inside the store Ortega started a fight wit some OTNC gang members, who chased Ortega to the car, hitting him as he tried to enter it. Aguirre said he then tried to run over the OTNC boys with his car.

Aguirre testified that he and Ortega then drove to Memorial Park, where he saw Pimentel with Felipe Juarez (Juarez) and watched Juarez put something in the waistband of his pants. Aguirre said Pimentel and Juarez soon left together in Pimentel's 1979 blue Monte Carlo and returned at about 1 a.m.

Nineteen-year-old OTNC member Eddie Bellot (Bellot) and fellow OTNC member Gabriel Mejia testified that on that same night they were hanging out with 18-year-old Coronado at the corner of Coolidge and 16th Streets in National City. They said that at about 12:30 to 12:45 a.m. a blue Regal or Monte Carlo pulled up, a passenger got out, walked to the rear of the car, and asked Bellot and the others where they were from. They replied, "OTNC." Words were exchanged, and Bellot and Coronado walked toward the man expecting to fight. However, when the man pulled a gun from under his shirt, Bellot and Coronado began running and shots were fired. Bellot said he heard Coronado call his name and when he turned around, Coronado was lying on the ground and the car and shooter were gone. Coronado died at the scene from multiple gunshot wounds.

National City Police Detective Craig Boegler (Boegler) issued a bulletin to law enforcement agencies describing the car in which the shooter was seen riding as a 1978-1979 blue two-door Monte Carlo, believed to be driven by a Calle Treinte member. Pimentel was stopped by police three times between July 3 and July 18 because his car matched the description in the bulletin. Police photographed his car and sent reports to Boegler.

On July 29, 1991, after Diaz identified Pimentel's car from a photograph as the one he had seen at the 7-Eleven store on June 28, Boegler and district attorney's office investigator Robert Marquez (Marquez) went to Pimentel's place of employment and took more photographs of his car. When Pimentel came out and asked what they were doing, they explained his car matched the description of the one involved in the

shooting. Pimentel agreed to go to the National City Police station to talk with Boegler and Marquez; however, because Pimentel had very little gasoline in his car, Boegler and Marquez followed him to his home, where he left the car and then rode with them to the police station. They told Pimentel he was free to leave at any time.

At the police station Boegler and Marquez began interviewing Pimentel. After about one and one-half to two hours of discussion, Boegler falsely told Pimentel that his car had been videotaped at the 7-Eleven store on June 28, and Pimentel agreed he had been at the store and that his passenger had been in an altercation with OTNC members. Boegler then advised Pimentel of his Miranda rights, which Pimentel waived. The remainder of the interview was taped.

During the taped interview Pimentel first stated that on the evening of June 28 he and Christian Gonzales (Christian) had driven to the 7-Eleven store, where Christian had become involved in a fight. Pimentel said he then drove to Memorial Park, dropped off Christian and his brother Juan, and then drove home. He later changed his story, saying Juarez and Joe Ayala (Ayala) had also been in the car. Pimentel then denied either of these accounts was true and claimed he had not been involved.

Pimentel then said he had driven to the scene of the shooting with Christian and Juan, where Christian had fired at a group of youths. Pimentel then retracted this story, stating he had been at the 7-Eleven but had not been involved in the shooting. At this point Boegler arrested Pimentel for Coronado's murder.

Boegler and Marquez interviewed Pimentel again the following day. Pimentel again waived his Miranda rights and the interview was taped. During this interview Pimentel said that on the evening of June 28 he and Juarez had fought with some OTNC members at the 7-Eleven, then drove to Memorial Park, where Juarez retrieved a gun from a hiding place, and then returned to National City. There, they say a group on a street corner. Juarez made a gang sign and got out of the car. Pimentel said he then heard gunshots and saw Coronado fall; Juarez jumped into the car and the two drove back to the park.

Bellot and Gabriel Mejia identified Juarez as the shooter and Pimentel's car as the one in which the shooter had been riding.[3/]

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3. Juarez was arrested for Coronado's murder and joined with Pimentel as a codefendant. However, at

At trial, Pimentel denied having driven the car involved in the shooting. He testified that on the night of the shooting he left work at around 9:30 p.m. and went home. Other members of his family verified that he had spent the entire night at home with them.

Pimentel testified that during the police interviews he felt pressured and merely told Boegler and Marquez what he thought they wanted to hear. He explained he agreed with Boegler and Marquez's version because they led him to believe if he did not cooperate he would face a lengthy sentence, whereas if he said what they wanted to hear his sentence would be only four or five years.

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the time of Pimentel's trial, criminal proceedings against Juarez had been suspended under section 1368. The prosecution's motion to continue Pimentel's case until Juarez's competency could be established was denied by the trial court.

The jury found Pimentel guilty of second degree murder and further found he had been armed with a firearm. The trial court sentenced him to fifteen years to life for the murder conviction and to one year for being armed with a firearm. Pimentel appeals.

DISCUSSION

I. Admission of Pimentel's Confession

Pimentel contends his admissions and confession to the interrogating officers should have been excluded because the officers subjected him to a custodial interrogation without first advising him of his Miranda rights. We agree.

Prior to trial, Pimentel moved to exclude the statements he made during the police station interviews, arguing that he had been wrongfully subjected to a custodial interrogation without first being advised of his Miranda rights and that, in any event, the admissions were

involuntary. The trial court ruled there was no basis to suppress under Miranda and permitted the statements to be introduced at trial.

Under Miranda v. Arizona, supra, an individual may not be subjected to interrogation in official custody unless he previously has been advised of an has knowingly and intelligently waived his right to silence, to an attorney and to an appointed attorney if he cannot afford to hire counsel. By bracing against "the possibility of unreliable statements in every instance of in-custody interrogation" Miranda serves to guard against the use of unreliable statements at trial. (Johnson v. New Jersey (1966) 384 U.S. 719, 730.) A Miranda advisement is required when a person is subjected to questioning after he "has been taken into custody or otherwise deprived of his freedom of action in any significant way."

(People v. Lopez (1985) 163 Cal.App.3d 602, 605.) "`[T]he ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associate with a formal arrest.'" (People v. Morris (1991) 53 Cal.3d 152, 197, quoting California v. Beheler (1983) 463 U.S. 1121, 1125 and Oregon v. Mathiason (1977) 429 U.S. 492, 495.) When there has been no formal arrest, the relevant question is "how a reasonable man in the suspect's position would have understood the situation." (Berkemer v. McCarty (1984) 468 U.S. 420, 422.) "In deciding the custody issue, the totality of circumstances is relevant, and no one factor is dispositive." (People v. Boyer (1989) 48 Cal.3d 247,272.) "[T]he most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia

of arrest are present, and (4) the length and form of questioning." (Ibid.) "[T]he mere fact that [an individual] was a suspect does not establish custodial interrogation." (People v. Morris, supra, 53 Cal.3d at p. 197.) "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (Oregon v. Mathiason (1977) 429 U.S. 492, 495.)

In reviewing a claim of this nature we "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported." (People v. Boyer, supra, 48 Cal.3d at p. 263.) "However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement[s] were illegally obtained." (Ibid.) We therefore must scrutinize the evidence to determine

whether the interrogation of Pimentel became an "in custody" examination before the Miranda warning was given.

We are satisfied that the interrogation initially was non-custodial in nature. Pimentel's car had been stopped three times previous to the incident now in question, and the police obviously considered of importance the similarity of his car to that identified as the one used in the homicide. When they encountered Pimentel on the day in question they were again inspecting and taking pictures of the car. The initial questioning of Pimentel, in the parking lot, was the result of his voluntarily approaching and questioning the police. The subsequent adjournment to the police department was because of the suggestion that it would look bad for Pimentel to be talking to police in the parking lot.

The subsequent events leading to the interview at the police station also indicate a voluntary meeting with the police. The officers accompanied him to his home because he did not have enough gasoline to drive to the station; they waited while he changed clothes; when he departed he informed his family he would return in a couple of hours.

The initial events at the police station reinforced the conclusion that the interview was voluntary. Upon arrival at the police station Boegler and Marquez told Pimentel he could leave at any time. Marquez testified that when he and Boegler first contacted Pimentel they had not considered him the focus of their investigation and had not intended to talk to him, but merely wanted to photograph his car.

Circumstances changed, however, during the interview. While the

questioning initially related to general subjects to which Pimentel could have responded without incriminating himself, it thereafter became much more focused. The crucial shift in questioning in our opinion came when the officers commenced falsely advising Pimentel that they had a videotape of his car at the store on June 28. At this point we believe Pimentel ceased to be simply a source of general information, or even one of several possible leads, and became the focus of the investigation. It is difficult for us to believe that the officers would commence telling Pimentel falsehoods which directly linked him to the crime if they were not at that point endeavoring to extract a confession or admission from him. (Cf. People v. Boyer, supra, 48 Cal.3d 247, 264-265.)

The Miranda warning was not given until after this focused interrogation was

commenced; it was not given until after the officers had gotten Pimentel to admit he was at the 7-Eleven during the fight with the OTNC members. After reviewing the totality of the circumstances, as directed in Boyer (i.e., the setting at the police station, the one and one-half to two hours of interrogation before Miranda advisement was given, and the use of false information to elicit an admission (fn. 4, ante)) we conclude a reasonable man in Pimentel's situation would have understood his freedom of movement had become so restricted that he was "in custody." The interrogation became custodial before Pimentel was advised of his Miranda rights.

Under California law a non-Mirandized confession is presumed to taint a later Mirandized confession. (People v. Celaya (1987) 191 Cal.App.3d 665, 673.) This is because of the psychological or

practical disadvantages of having "'let the cat out of the bag by confessing.'" (People v. Sims (1993) 5 Cal.4th 405, 445, quoting People v. Johnson (1969) 70 Cal.2d 541, 547.) The admissions and confessions which followed Pimentel's initial admission to being present at the 7-Eleven during the altercation that evening were inextricably connected to the first admission. The statements during the first day's taped interview were part of the same continuous interrogation conducted at the same location by the same officers. The second day's interview was but a continuation of the first. The taped post-Miranda admissions and confessions were the product of the initial pre-Miranda custodial interrogation and were improperly admitted.

The erroneous admission of an involuntary confession does not require

automatic reversal. (People v. Sims, supra, 5 Cal.4th at p. 447; People v. Cahill (1993) 5 Cal.4th 478, 509.) The prejudicial effect of the erroneous admission of a coerced confession is determined for purposes of California law under the Watson standard of whether there is a reasonable probability of a different result absent the error. (People v. Cahill, supra, 5 Cal.4th at pp. 509-510.) If a confession has been held inadmissible under the federal Constitution, the prejudicial effect of its admittance is judged under the federal Chapman standard of whether error was harmless beyond a reasonable doubt. (People v. Sims, supra, 5 Cal.4th at p. 447; People v. Cahill, supra, 5 Cal.4th at p. 510.)

The taped interviews were unquestionably prejudicial to Pimentel. During the interviews he admitted driving to the 7-Eleven, being present there

during the fight with OTNC members, returning to Memorial Park where the shooter retrieved a gun, and then driving the shooter back to National City and being present during Coronado's killing. Although rival gang members identified him as being at the altercation at the 7-Eleven, none of these witnesses was able to identify him from the scene of the shooting, only recognizing his car. The prosecution's case depended upon Pimentel's statements to the officers. Admission of the taped confession was prejudicial error.

II. Other Asserted Error

Pimentel raises a number of other contentions on appeal, all of which have to do with asserted errors in the court's instructions. Since we have determined a new trial is required because of violation of basic constitutional rights of the defendant, our discussion of other

possible areas of trial error might be considered unnecessary. However, for the court's guidance in the event the case is retried and in the further event the same controversies with respect to proffered instructions arise, we venture the following observations.

The court refused to give instructions on the evaluation of eye-witness testimony (CALJIC Nos. 2.91 and 2.92), based upon the court's conclusion that there had ben no eye-witness testimony identifying the defendant as the perpetrator of the crime. This determination missed the point that the identification of the car involved in the crime, as well as in the preceding 7-Eleven incident, was crucial to the case, and further that it was at least theoretically subject to question. Whether failure to give the instructions was prejudicial we do not now determine.

If the same evidentiary circumstances presents itself in retrial, however, we believe it would be better practice to give the instructions.

Pimentel next contends instructions should have been given on the possibly lesser-included offense of voluntary manslaughter based upon a killing influenced by heat of passion, as well as an instruction on the complete defense of self-defense. "`"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the cases are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (People v. Wickersham

(1982) 32 Cal.3 307, 323, quoting People v. St. Martin (1970) 1 Cal.3d 524, 531.)

We believe the court did not err in finding insufficient evidence to warrant the giving of these instructions. The evidence established that Pimentel's car arrived at the scene of the crime some substantial period later than the affray at the 7-Eleven, a factor effectively undermining any claim of an act done in the heat of passion. As for self-defense, the evidence established that the occupants of Pimentel's car got out and walked toward the victims, and that when they approached, the assailant drew a gun and fired at the unarmed Coronado. The court did not exceed the bounds of discretion, we believe, in concluding that the very minimal evidence suggesting a possible fight before the shooting (two large chunks of concrete in the street which might have been used as offensive

weapons) was insufficient to warrant the instruction.

Pimentel also contends a lesser-included offense instruction should have been given on the theory of a killing occurring during the commission of a misdemeanor, which results in the crime of involuntary manslaughter. (§ 192, subd. (b); People v. Wilson (1967) 66 Cal.2d 749, 763.) The evidence was susceptible of the conclusion that the original intent of the assailant was merely to scare the opposing gang members, Pimentel argues, which crime is the misdemeanor brandishing of a firearm under section 417, subdivision (a)(2). If a killing resulted during the commission of this offense, it is argued, it should have been classified as a misdemeanor.

This analysis overlooks the only direct evidence in the case related to the shooting, which was that Juarez, the

assailant, pulled his gun before any contact was made with the opposing gang members, and shot Coronado at close range as he was running away. The misdemeanor-manslaughter theory of section 192, subdivision (b) applies only to crimes committed without malice. Where a person deliberately performs an act dangerous to life, knowing that his conduct endangers the life of another, and performs it in a conscious disregard for life, malice will be implied. (See People v. Nieto Benitez (1992) 4 Cal.4th 91, 111; 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) 1993 Supp., § 503, pp. 98-100.) Advancing on an opponent with a firearm, and then shooting the victim as he is running away, is a set of circumstances impelling a finding of malice, and precluding

application of the misdemeanor-manslaughter principle.[4/]

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4. Having agreed that the lesser-included offense instructions, under the evidentiary circumstances of this case, were properly denied, we nevertheless must comment on a possible misinterpretation of relevant law entertained by the prosecution and conceivably by the court. The contention was that since Pimentel denied being at the scene of the crime, asserting an alibi defense, the lesser-included offense possibilities were somehow inapplicable to him. The prosecution's case against Pimentel was based on aider and abettor liability. The court instructed on this theory by giving CALJIC Nos. 3.00 and 3.01, which teach that an aider and abettor is guilty of crime not for an act which he himself perpetrates, but for the criminal act of his principal in crime. (People v. Beeman (1984) 35 Cal.3d 547, 560; People v. Durham (1969) 70 Cal.2d 171, 181.) The aider and abettor's liability, therefore, is "derivative." (See Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73 Cal.L.Rev. 323 at p. 337.) Hence, the aider and abettor is entitled to any defense or lesser-included offense instruction to which the principal perpetrator may be entitled. If, therefore, the actual assailant in this case, Juarez, should be entitled under the evidence to a lesser-included offense instruction, Pimentel would be equally so entitled.

Finally, at oral argument Pimentel raises for our consideration the newly articulated concept of the requirement of instruction on the elements of the underlying or "predicate" crime contemplated by the aider and abettor. Set forth in People v. Mouton (1993) 15 Cal.App.4th 1313, 1320, this theory grows from the principle, as recited in CALJIC No. 3.02, that an aider and abettor is guilty not only of the "particular crime that to his knowledge his confederates are contemplating committing, but his knowledge his confederates are contemplating committing, but he is also liable for natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted." In order to arrive at a conclusion as to what was "natural and probable consequence" of an originally contemplated crime, the Mouton court said,

one must determine what that "predicate" crime was. Hence it is error to refrain from giving instructions not only as to the crime charged but also as to all possible uncharged predicate crimes.

We have very recently considered this issue in some depth in People v. Solis (1993) ____ Cal.App.4th ____ (1993 D.A.R. 14837). We concluded that the focus on the predicate criminal activity was an issue of fact, not requiring criminal definition. We opined that a requirement of instruction on the various possible predicate crimes would be an unwarranted and confusing addition to what are already somewhat confusing and abstract instructions. We do not now depart from this view, and hence reject Pimentel's contentions based on People v. Mouton.[5/]

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5. The essence of our opinion is Solis was that the added instruction(s) required by the theory of Mouton were not necessary, and very likely could be confusing. We did not indicate, and do

DISPOSITION

The judgment is reversed .

Froehlich, J.

I concur:

Todd, J.

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not hold in this case, that the giving of such instruction(s) on the elements of a "predicate" offense would be error. As the concurring and dissenting opinion points out, if this case is retired the trial judge may, in an abundance of caution, add certain instructions pertaining to the predicate offenses which our opinion in Solis might suggest are unnecessary.

Wiener, J., concurring and dissenting:

I concur in the judgment reversing Pimentel's conviction. I also agree the trial court should not be bound from following People v. Mouton (1993) 15 Cal.App.4th 1313. It is both fair to defendant and judicially economical to allow the trial court this latitude where the California Supreme Court may disagree with People v. Solis (1993) ___ Cal.App.4th ____. Moreover, even if the Supreme Court denies review, but decertifies Solis, the trial court should not be prevented from following Mouton because our decision to the contrary has become law of the case. My agreement on giving the trial court appropriate flexibility reflects my conclusion, reinforced by the Supreme Court having unanimously denied review on August 19, 1993, that Mouton was correctly decided.

Accordingly, I respectfully dissent from that portion of the opinion which rejects Pimentel's contentions based on Mouton.

/s/

WEINER, Acting P.J.

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APPENDIX B

APPENDIX B

[Filed March 24, 1994]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division One, No. D016597

S037579

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

GUSTAVO PIMENTEL

Respondent's petition for review DENIED.

Lucas, C. J. and George, J. are of the opinion the petition should be granted.

/s/ Lucas
Chief Justice

APPENDIX C

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

Office of the County Clerk
San Diego County
220 W. Broadway Street
San Diego, CA 92101

RE: PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff-Respondent
v.
PIMENTEL, GUSTAVO
Defendant-Appellant
D016597
San Diego County No. CR125354

* * REMITTITUR * *

I, Stephen M. Kelly, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on December 20, 1993, and that this opinion or decision has now become final.

__Appellant __Respondent to recover Costs.
__Each party to bear own costs.
X Costs are not awarded in this proceeding.

Witness my hand and the seal of
the court affixed this

April 21, 1994

STEPHEN M. KELLY, Clerk

By: Jean Cook
Deputy Clerk

cc: All Counsel (Copy of remittitur only, California Rules of Court, rule 25(e)).

Supreme Court, U.S.
FILED
JUN 20 1994
OFFICE OF THE CLERK

(3)

No. 93-1844

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GUSTAVO PIMENTEL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
DIVISION ONE OF THE FOURTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID M. MCKINNEY
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QUESTIONS PRESENTED[1]

1. May a trial court determine that a criminal defendant is "in custody" for *Miranda* purposes by considering the interrogating police officers' "disclosed" beliefs to defendant that he was a participant in the homicide?

2. Did the initial non-*Mirandized* confession taint the later *Mirandized* confession if the latter confession were found to have been inextricably connected to the non-*Mirandized* confession, the two being part of but one continuous interrogation?

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[1] Respondent submits the following "Questions Presented" independent of petitioner's, because petitioner inaccurately presents the relevant question to this Court as being similar to one recently decided by this Court in *Stansbury v. California* ____ U.S. ____ (April 26, 1994) [62 U.S.L. Week 4279.]

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No. 93-1844

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Petitioner,	)
v.	)
GUSTAVO PIMENTEL,	)
Respondent.	)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, GUSTAVO PIMENTEL, respectfully requests that this Court deny the State of California's petition for writ of certiorari seeking review of the unpublished opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, and submits the following as his Brief in Opposition.

INTRODUCTION

Petitioner, the People of the State of California, seeks a writ of certiorari in this Court to overturn a decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, declaring a custodial interrogation undertaken by investigating police offices to have been conducted in violation of respondent's Fifth Amendment *Miranda* rights; i.e., respondent having been deprived of his freedom in a meaningful manner, interrogating police officers failed to advise him of his constitutional right to remain silent, that any statement he made might be used against him, and that he had a right to the presence of an attorney, either retained or appointed.

STATEMENT OF THE CASE

Respondent concurs with petitioner's presentation of the Statement of the Case appearing at pages 3 through 5 of the petition for writ of certiorari.

STATEMENT OF THE FACTS

A. INTRODUCTION.

The following statement of facts is taken from the Reporter's and Clerk's Transcripts of the trial court proceedings. Because the facts of respondent's case have been fairly and accurately presented by the Court of Appeal in its opinion, respondent's statement of facts will in large part track, but not mirror, the statement of facts as outlined by the Court of Appeal, Fourth Appellate District, Division One, in its unpublished opinion of December 20, 1993.

B. FACTUAL OVERVIEW.

Luis Coronado's June 29, 1991, killing was the result of rivalry and animosity between the Logan Heights Calle Triente (Calle Triente) and the Old Town National City (OTNC) street gangs. The killing apparently followed an altercation that took place earlier that same evening between several OTNC members and two Calle Triente members in a 7-Eleven store in National City. Respondent, a 19-year old Mexican boy with no prior police record, was convicted of second degree murder, having been found to have been the driver of the car that was allegedly involved in both incidents. The accused shooter, having been declared incompetent to stand trial, has not yet been tried.

C. THE ANTECEDENT ALTERCATION AT THE 7-ELEVEN.

OTNC gang members 16-year-old Enrique Diaz (Diaz) and 15-year-old Rudy Cedano (Cedano) testified that at about 10:00 or 10:30 p.m. on June 28, 1991, they drove, with Miguel Mejia, another youth and two girls, to the 7-Eleven store at 24th and Highland in National City where they planned to steal some beer. (RT 335.) Diaz and Cedano said that while they were leaving the store, two members of the Calle Triente gang walked in. (RT 290, 296.) When the Calle Triente members entered the store, the two groups mutually "claimed," words were exchanged, and an altercation ensued. The one Calle Triente boy ran to his blue Monte Carlo, jumped in and started the car. (RT 293, 297.) Meanwhile, the driver's companion attempted to get into the car, but he was repeatedly hit by the two OTNC members while trying to do so. (RT 291, 297, 313.) He ultimately stumbled into the car, as the OTNC boys were slamming the door on his leg and kicking at the car door. (RT 291, 297.) The driver then put the car into reverse, nearly running Diaz over. (RT 338.)

Although Diaz and Cedano each participated in a photographic lineup a few days after the 7-Eleven altercation, neither was able to recognize any of those individuals (including respondent) as the driver of the car. (RT 328, 846-847.) Diaz did, however, identify respondent's car at the police station impound lot and then at respondent's trial, after some equivocation, positively identified respondent as the driver of the car in question. (RT 323, 324, 327, 621.)

Similarly, Cedano also was unable to pick respondent's picture out of the photo lineup several days after the incident, but he then, too, identified respondent as the driver of the car during direct examination at respondent's trial. (RT 349, 350, 368, 846-847.) Although Diaz, like Cedano, was unable to recognize respondent's car in a photo lineup shown him shortly after the incident, he later identified respondent's car when shown it at the National City police station. (RT 341.)

In addition to eliciting testimony concerning the 10:00 p.m. altercation at the 7-Eleven store, the prosecution introduced evidence as to a mysterious second altercation that evening just two hours later at the same 7-Eleven store. This incident involved a fact scenario remarkably identical to that of the first altercation, albeit allegedly with different gang members.

Former Calle Triente gang member Javier Aguirre (Aguirre) testified for the prosecution that at about 12:00 a.m. that evening he and Calle Triente member Jerry Ortega (Ortega) drove in Aguirre's 1983 blue Monte Carlo to that same 7-Eleven store to buy alcohol. (RT 216.) He said that inside the store Ortega started a fight with some OTNC gang members, who then chased Ortega to the car, hitting him as he tried to enter it. Aguirre said he then tried to run over the OTNC boys with his car. (RT 219.)

Aguirre testified that he and Ortega then drove to Memorial Park, where he saw Pimentel with Felipe Juarez (Juarez) and watched Juarez put something in the waistband of his pants. Aguirre said Pimentel and Juarez soon left together in Pimentel's 1979 blue

Monte Carlo and returned again at about 1:00 a.m. (RT 252, 258, 271, 273.)

D. THE SHOOTING.

19-year-old OTNC member Eddie Bellot (Bellot) and fellow OTNC member Gabriel Mejia testified that on the night of the killing they were hanging out with 18-year-old Luis Coronado (Coronado) at the corner of Coolidge and 16th Streets in National City. They said that at about 12:30 to 12:45 a.m. a blue Regal or Monte Carlo pulled up. A passenger got out, walked to the rear of the car and asked Bellot and the others where they were from. (RT 380, 396, 452, 453.) They replied, "OTNC," heated words were exchanged, and Bellot and Coronado then walked toward the Calle Triente boy expecting to fight. (RT 385, 455.) However, when the approaching boy pulled a gun from under his shirt, Bellot and Coronado began running and shots were fired. (RT 386, 521.) Bellot said he heard Coronado call his name and when he turned around, Coronado was lying on the ground and the car and shooter were gone. (RT 386.) Coronado died at the scene from multiple gunshot wounds. (RT 521.)

National City Police Detective Craig Boegler (Boegler) issued a bulletin to law enforcement agencies describing the car in which the shooter was seen riding as a 1978-1979 blue two-door Monte Carlo, believed to be driven by a Calle Triente member. Because respondent owned a car similar to that described by the OTNC gang members, he was stopped by police officers several times prior to his ultimate arrest, on one occasion by some eight police cars. (RT

63-64.) On July 3, 1991, some five days after the shooting, for example, respondent was stopped by an officer of the National City Police Department, who also searched his car at the time of the stop. (RT 524.) Approximately two weeks later, on July 18, 1991, an officer of the La Mesa Police Department stopped respondent and took pictures of his car. (RT 588-589.) The very next day, respondent was again stopped by officers of the La Mesa Police Department and again pictures were taken of his car. (RT 598.)

On July 29, 1991, after Diaz identified Pimentel's car from a photograph as the one he had seen at the 7-Eleven store on June 28, Boegler and district attorney's office investigator Robert Marquez (Marquez) went to Pimentel's place of employment and took more photographs of his car. (RT 620.) When Pimentel came out and asked what they were doing, they explained that his car matched the description of the one involved in the shooting. (RT 623.)

Pimentel thereupon agreed to go to the National City police station to talk with Boegler and Marquez. However, because Pimentel had very little gasoline in his car, Boegler and Marquez followed him to his home, where he left his car and then rode with them to the police station. (RT 623.) Once there, they told Pimentel he was free to leave at any time. (RT 61.)

At the police station Boegler and Marquez began interviewing Pimentel. During the ensuing interview, respondent initially denied any gang involvement as well as all participation in the alleged 7-Eleven altercation. (RT 624.) After about one and one-half to two hours of discussion, however, Boegler falsely told

Pimentel that he had been videotaped inside the 7-Eleven store, that his car had been videotaped in the parking lot of that same store and that they had eyewitnesses who had identified him as being there. Confronted with the claim of such overwhelming evidence against him, Pimentel agreed he had been at the store and that his passenger had been in an altercation with OTNC members. (RT 73-75, 89-90 108, 624, 645.) Boegler then advised Pimentel of his *Miranda* rights, which Pimentel waived.

During the taped interview that then followed, Pimentel first stated that on the evening of June 28, he and Christian Gonzales (Christian) had driven to the 7-Eleven store, where Christian had become involved in a fight. (Supp. RT 51.)[2] Pimentel said he then drove to Memorial Park, dropped off Christian and his brother Juan, and then drove home. (Supp. RT 62.) He later changed his story, saying Juarez and Joe Ayala (Ayala) had also been in the car. (Supp. RT 69.) Pimentel then denied either of these accounts was true and claimed he had not been involved at all. (Supp. RT 76-77.)

Upon persistent demands that he come forth and tell the truth, which, the officers stated, they already knew, Pimentel then said he had driven to the scene of the shooting with Christian and Juan, where Christian had fired at a group of friends. (Supp. RT 84.) Pimentel then retracted this story, stating he had been at the 7-Eleven but had not been involved in the shooting. (Supp. RT 92.) At this point Boegler arrested Pimentel for the murder of Coronado.

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[2] "Supp. RT" in this response refers to the Clerk's Supplemental Transcript, Volume 1, containing the transcript of appellant's two taped interviews.

(Supp. RT 92.) Pimentel continued to insist, however, that he had not been involved in the shooting nor did he know who had been. (Supp. RT 96.)

Boegler and Marquez interviewed Pimentel again the following day, at the outset of which Pimentel was falsely told that Christian and Juan had contradicted what he had said the day before and that they, in fact, had "fingered" him as the driver. (Supp. RT 99, 102.) Pimentel again waived his *Miranda* rights and the subsequent interview was taped. During this interview Pimentel said that on the evening of June 28th, he and Juarez had fought with some OTNC members at the 7-Eleven, then drove to Memorial Park, where Juarez retrieved a gun from a hiding place, and then returned to National City. (Supp. RT 102-103, 110-115, 118.) There, they saw a group on a street corner, whereupon Juarez made a gang sign and got out of the car. Pimentel said he then heard gunshots and saw Coronado fall; Juarez jumped into the car and the two drove back to the park. (Supp. RT 126-129, 134, 147.)

Bellot and Gabriel Mejia identified Juarez as the shooter and they also identified Pimentel's car as the one in which the shooter had been riding as well.[3] (RT 392.) At trial, however, Pimentel denied having driven the car involved in the shooting. (RT 1853, 1857.) In his defense, he testified that on the night of the

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[3] Juarez was arrested for Coronado's murder and joined with Pimentel as a codefendant. However, at the time of Pimentel's trial, criminal proceedings against Juarez had been suspended under California Penal Code section 1368. The prosecution's motion to continue Pimentel's case until Juarez's competency could be established was denied by the trial court. Coronado still remains incompetent to stand trial at this time.

shooting he left work around 9:30 p.m. and went home. (RT 1809.) Other members of his family verified that he had spent the entire night at home with them, where they were preparing to celebrate the birthday of the family's oldest son the following day, a significant tradition with this particular family. (RT 696-672, 978-980, 1003-1007, 1011-1019, 1025-1036, 1745-1747, 1755, 1773-1776, 1788.)

In addition, Pimentel testified that during the police interview he had felt pressured and merely told Boegler and Marquez what he thought they wanted to hear. (RT 1880, 1949-1951, 1969.) He explained he had agreed with Boegler's and Marquez's version of events because they led him to believe if he did not cooperate he would face a lengthy sentence, whereas if he said what they wanted to hear his sentence would be only four or five years. (RT 1881-1882, 1909, 1955-1956.)

The jury found Pimentel guilty of second degree murder and further found he had been armed with a firearm. (CT 40-41, 135, 165, 168.) The trial court sentenced him to fifteen years to life for the murder conviction and to one year for being armed with a firearm. (CT 170; RT 1529.)

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE.

Contrary to petitioner's representation, the California Court of Appeal's decision in *Pimentel* determining "in custody" for purposes of *Miranda* advisements is not in conflict with decisions of this Supreme Court and most definitely is not in conflict with this Court's recent *Miranda* decision in *Stansbury* v. *California* (_____ U.S. _____ (April 26, 1994) (62 U.S.L. Week 4279). On the contrary, in casting the issue presented by *Pimentel* as being the Court of Appeal's improper consideration of the police officers' "subjective beliefs," petitioner misleadingly misframes the determinative circumstances upon which the Court of Appeal's opinion was actually based. In fact, the California court's opinion that respondent's Fifth Amendment rights had been violated did not rest upon the subjective views of the interrogating officers at all, but rather on the fact that the investigating officers had demonstrably "disclosed" their suspicions to respondent, "disclosed" being the operative term for the court's holding.

Petitioner contends that the *Pimentel* decision is in conflict with this Court's recent decision in *Stansbury* v. *California, supra*. But not only is this not true, the *Pimentel* decision is solidly supported by *Stansbury* itself. Indeed, in correctly arguing that *Stansbury* prohibits a trial court from considering whether a respective investigation has focused on the defendant, petitioner disregards the operative caveat to this Court's *Stansbury* discussion, namely that it is the **undisclosed** suspicions

of police interrogators that are irrelevant to the question of "in custody." As this Court in *Stansbury* noted: "Our cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (**assuming those suspicions remain undisclosed**) is not relevant for purposes of *Miranda*." (*Stansbury* v. *California*, *supra*, 62 U.S.L. Week, at p. 4281; emphasis added.)

In fact, this Court repeatedly emphasized throughout its opinion in *Stansbury* that -- in this Court's own words -- although an "undisclosed" subjective view is irrelevant, a "disclosed," "communicated," "articulated," "otherwise manifested," "somehow manifested," suspicion that is "conveyed, by word or deed to the individual being questioned," is a most relevant consideration to the "in custody" question. Inexplicably overlooked by petitioner is that what was determinative for the California Court of Appeal in finding that a reasonable person in respondent's position would not have felt he was at liberty to leave the interrogation was not that the officers subjectively suspected petitioner of the homicide, but rather that the officers had communicated that suspicion to Pimentel in no uncertain terms. (Opinion, at pp. A-16-18.)[4]

The Court of Appeal found Pimentel to have been in custody for purposes of *Miranda* at that point when the interrogators informed

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[4] References to the Court of Appeal's opinion will be to the pagination as contained in Petitioner's "Appendix A" in its "Appendices to Petition for Writ of Certiorari," which accompanies petitioner's Petition for Writ of Certiorari, the page numbering there differing from that of the court's opinion itself.

him they had hard, irrefutable evidence that he was involved in the homicide in question. To be sure, determinative for the Court of Appeal, as it itself emphasized, was that the officers told Pimentel, albeit falsely, they had a videotape of him in the altercation in the 7-Eleven, they had a videotape of his car in the parking lot of that same 7-Eleven, and they had eyewitnesses who had positively identified him as having been at this 7-Eleven. (Opinion, at pp. A-17-18.)

Contrary to petitioner's presentation, the officers themselves may not have subjectively considered respondent a strong suspect at that time, nor did the Court of Appeal so hold, a fact that serves to reinforce that the officer's subjective beliefs were not a consideration to the Court of Appeal. Indeed, it was not what the officers believed but rather what they communicated to Pimentel that was determinative for the Court of Appeal, and what the officers effectively told Pimentel was that they had solid evidence that he was involved in the murder. It was only upon being given such information that the Court of Appeal believed a reasonable person, being told there was irrefutable evidence that he was a participant in a murder, would, at that point, not have believed himself free to get up and leave the interrogation. At that point, the Court of Appeal held, respondent was in custody and the advisement of his constitutionally mandated *Miranda* rights was required. (Opinion, at p. A-18.)

Finally, the court did not error in finding the subsequent *Mirandized* statements to have been tainted by the

unconstitutionality of the non-*Mirandized* admissions, in that the court found the second interrogation to have been one continuous interrogation, inextricably connected to the first, with no attenuating break in the chain of causation. (Opinion, at p. A-19.) The court's holding on this aspect is fully supported by state law as well as federal law.

ARGUMENT

I

THE CALIFORNIA REVIEWING COURT PROPERLY RECOGNIZED THAT INTERROGATING OFFICERS' "DISCLOSED" SUSPICIONS ARE A PROPER CONSIDERATION IN DETERMINING CUSTODIAL INTERROGATION FOR PURPOSES OF *MIRANDA*.

Respondent would note preliminarily that he does not take issue with petitioner's general presentation of the relevant law as to when "in custody" becomes operative for purposes of *Miranda* advisements. The law as outlined by this Court is, of course, clear. The short answer to petitioner's presentation is simply that it does not apply to respondent's case here.

The thrust of petitioner's argument is that respondent's case is on all fours with this Court's recent case of *Stansbury* v. *State of California* (_____ U.S. _____ (April 26, 1994) (62 U.S.L. Week 4279. (Petition, pp. i, 7, 23-24), in which this Court reiterated that the subjective beliefs of interrogating Officers are irrelevant as to whether a reasonable person would believe his freedom were restricted. Although petitioner inaccurately represents respondent's circumstances as being similar to those in *Stansbury*, reference to this Court's recent discussion in *Stansbury* is helpful because that discussion unequivocally demonstrates why the Court of Appeal's *Pimentel* opinion is consistent with this Court's line of "in custody" decisions. To be sure, respondent welcomes a *Stansbury* analysis, for the facts of *Stansbury* and those of his own case are dramatically distinguishable.

In *Stansbury*, it will be recalled, Lieutenant Johnston was interviewing defendant at the police station and began to suspect

defendant was the murderer of young Roby Jackson when Stansbury "volunteered" that he had left his home about midnight on the evening in question in a borrowed turquoise car. Johnston became suspicious, because a witness had seen the victim thrown from a turquoise car in the early morning hours. Importantly, Johnston did not communicate to defendant that he had cause to be suspicious, but simply asked an additional question. On review, this Court held that Johnston's "undisclosed" suspicions were irrelevant to the question of whether defendant felt his freedom was restricted. The relevant consideration, rather, was the "compulsive" nature of the interrogation. (*Stansbury* v. *California*, *supra*, U.S.L. Week at pp. 4280-4281.)

In the case *sub judice*, by way of contrast, the interrogating officers themselves did not necessarily consider respondent a suspect. To be sure, what distinguishes *Stansbury* from *Pimentel* is that the officers in our case communicated in unequivocal terms their belief to respondent that he was a suspect, indeed, the suspect. Determinative for the California court, in its own words, was, contrary to petitioner's representation, not what the officers believed, but rather **what they said to respondent** concerning what they believed. (Opinion, at pp. A-16-18.) The court found the interrogation to have become "compulsive" when the two officers attempted to elicit a confession from Pimentel. Although Pimentel had steadfastly denied being a gang member or having been involved in the 7-Eleven altercation, the officers falsely told him that they had a videotape of him inside the 7-Eleven, they had a

videotape of his blue Monte Carlo (with a dent) in the 7-Eleven parking lot, and they had eyewitnesses who had identified him as having been there. (Opinion, at p. A-17; RT 74, 89-91, 108, 1999, 2038-2039.)

It was at this point, and only then, that the Court of Appeal found that the "interrogation became focused" and would have caused a reasonable person in Pimentel's situation to have believed he was not free to leave, having just been told the government had irrefutable evidence of his involvement in the homicide.[5] (Opinion, at pp. A-18.)

The Court of Appeal properly stated that the ultimate issue to be decided was "how a reasonable man in the suspect's position would have understood the situation." (Opinion, at p. A-13; citing *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 442.) In applying this test, the Court of Appeal acknowledged that even though respondent's car had been stopped by police officers on three different occasions previous to the incident under consideration, respondent had voluntarily accompanied the officers to the police station and was told upon arrival he could leave at any time. The interview up to that point, the court stressed, was therefore non-custodial, and remained so during the more casual portion of that interview. (Opinion, at pp. A-15-16.)

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[5] Respondent respectfully submits that there is a significant difference from stating that the defendant was "the focus of the officer's suspicions" and "the interrogation became focused." To be sure, it is the fact that an interrogation becomes focused [the officers in our case attempting to elicit an admission] that gives a suspect cause to worry, thereby making the situation compulsive.

The nature of the interview changed, however, the California court expressly concluded, when the interrogation became much more focused and respondent was told by the officers they had significant, if not conclusive, proof of his involvement in the homicide. Concluding that the officers were attempting to extract a confession from respondent with their false information, the court held that a reasonable person in Pimentel's situation would have understood his freedom of movement had become so restricted to have constituted custody. As the Court of Appeal explained:

> "The crucial shift in questioning in our opinion came when the officers commenced falsely advising Pimentel that they had a videotape of his car at the store on June 28. At this point we believe Pimentel ceased to be simply a source of general information, or even one of several leads, and became the focus of the investigation. It is difficult for us to believe that the officers would commence telling Pimentel falsehoods which directly linked him to the crime if they were not at that point endeavoring to extract a confession or admission from him. (Citation)
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> "The *Miranda* warning was not given until after this focused interrogation was commenced; it was not given until after the officers had gotten Pimentel to admit he was at the 7-Eleven during the fight with the OTNC members. After reviewing the totality of the circumstances, as directed in *Boyer* (i.e., the setting at the police station, the one and one-half to two hours of interrogation before the *Miranda* advisement was given, and the use of false information to elicit an admission (fn. 4, *ante*))[6] we conclude a reasonable man in Pimentel's situation would have understood his freedom of movement had become so restricted that he was "in custody." The interrogation became custodial before Pimentel was advised of his *Miranda* rights." (Opinion, at pp. A-17-

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[6] None of the mentioned circumstances, it should be pointed out, was that the officers had subjectively focused upon respondent as a suspect.

18.)

It is clear, then, that the Court of Appeal considered it determinative that the officers communicated not merely their suspicions that he was involved in the murder, but that they informed him they had proof positive of his participation. And it is precisely this aspect of *Pimentel* that brings it directly under the coverage of *Stansbury* and progeny, for throughout its *Stansbury* opinion, this Court stressed that a "communicated" suspicion is indeed a consideration as to whether a suspect is "in custody." As this Court in *Stansbury* pointed out, an officer's subjective suspicions are irrelevant for purposes of *Miranda*, "assuming," that is, that "those suspicions remain undisclosed." (*Stansbury* v. *California* U.S.L. Week at p. 4281.) It flows from this, then, that the nature of an otherwise non-custodial interrogation changes as interrogating officers convey their suspicions to the person being questioned, which, as noted above, is Pimentel's case exactly.

In emphasizing that its prior decisions have hinged on the "compulsive" aspect of custodial interrogation, this Court in *Stansbury* pointed out, as an example, that the motorist in *Berkemer* v. *McCarty*, *supra*, 468 U.S. 420 was not in custody even though the traffic officer "apparently decided as soon as [the motorist] stepped out of his car that [the motorist] would be taken into custody and charged with a traffic offense." The reason, this Court explained, "was that the officer 'never communicated his intention to' the motorist during the relevant questioning." (*Stansbury* v. *California* U.S.L. Week at. p. 4280.) Importantly,

this Court emphasized, "[t]he lack of communication was crucial, for under *Miranda* '[a] **policeman's unarticulated plan** has no bearing on the question whether a suspect was "in custody" at a particular time'; rather, 'the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.'" (*Stansbury* v. *California* U.S.L. Week at 4280; citing *Berkemer* v. *McCarty*, *supra*, (1984) 468 U.S. 420, at 442; emphasis added.) Accordingly, the **communication** of suspicions, or the lack thereof, is a critical, if not determinative, factor in the "in custody" question. Indeed, it is an emphasis that appears throughout the entire *Stansbury* opinion as a recurring leitmotif.

Reiterating that it is the "uncommunicated" suspicions, in contrast to "disclosed suspicions," that are irrelevant to this issue, the Court in *Stansbury* noted:

> "It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, **if undisclosed**, does not bear upon the question whether the individual is in custody for purposes of *Miranda*. . . . The same principle obtains if an officer's **undisclosed** assessment is that the person being questioned is not a suspect. . . . **Save as they are communicated or otherwise manifested to the person being questioned**, an officer's evolving **but unarticulated suspicions** do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the *Miranda* custody inquiry." (*Stansbury* v. *California* U.S.L. Week at p. 4280; emphasis added.)

Expressly making respondent's point, this Court then continued on to reason that:

> "[a]n officer's knowledge or beliefs may bear upon the custody issue **if they are conveyed, by word or deed, to the individual**

> **being questioned."** (*Stansbury* v. *California* U.S.L. Week at p. 4280.)

Stansbury then concluded by explaining that even an officer's communicated suspicions will not in and of themselves be determinative, but nevertheless are a factor to be considered:

> "The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case. In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only **if the officer's views of beliefs were somehow manifested to the individual under interrogation** and would have affected how a reasonable person in that position would perceive his or her freedom to leave." (*Stansbury* v. *California* U.S.L. Week at p. 4280; emphasis added.)

Respondent's case here is directly on point with *Stansbury's* repeated caveat to the "focus" discussion, i.e., the "manifestation" to the suspect of the interrogators' suspicions. The California Court of Appeal found that the officers in its case did, in fact, communicate strong suspicions to Pimentel. The Court of Appeal, therefore, considered these communications in the precise light mandated by *Stansbury*, and decided that the communicated suspicions did affect whether a reasonable person in Pimentel's position would have perceived his freedom to leave to have been restricted. The California Court concluded that in light of the totality of the circumstances, a reasonable person would not have felt himself free to leave, and accordingly held that Pimentel

was thus in custody for purposes of *Miranda* advisements. (Opinion, at p. A-18.)

For his part, respondent would add that the California court's conclusion was correct, for certainly no reasonable person -- having been stopped by police officers on three different occasions in regards to a homicide, being told that his car matched the one used in the homicide, and being told during a lengthy interrogation at a police station that police had videotapes contradicting his denials and verifying his participation -- would have felt free to leave, and certainly not a nineteen-year old minority youth. It would not be reasonable for a young Mexican boy to believe that after being told by police officers they had conclusive proof he was a murderer, he could then simply get up and freely leave the police station.

ARGUMENT

II

THE TRIAL COURT'S RULING THAT RESPONDENT'S POST-*MIRANDIZED* ADMISSIONS AND CONFESSION WERE THE PRODUCT OF THE INITIAL PRE-*MIRANDA* CUSTODIAL INTERROGATION AND WERE THUS IMPROPERLY ADMITTED WAS CORRECT UNDER BOTH CALIFORNIA AND FEDERAL LAW.

Contrary to petitioner's assertion that the *Pimentel* court ruled contrary to federal law when it held respondent's subsequent *Mirandized* statements to have been tainted by his earlier non-*Mirandized* statements, the California court's opinion is thoroughly consistent with federal law. To be sure, *Pimentel* falls squarely under this Court's decision in *Oregon* v. *Elstad* 470 U.S. 298 (1985), for the California Court of Appeal concluded that respondent's second set of statements was inextricably connected with the first set of statements, the latter statements being but part of one continuous interrogation, occurring in the same general location, conducted by the same officers and having been virtually uninterrupted in time. (Opinion, at p. A-19.)

The first interrogation, which, the Court of Appeal held, wrongfully produced non-*Mirandized* admissions, terminated with respondent's arrest at 10:48 p.m., approximately six hours after the police station interview began. The same two officers then interrogated respondent once again the very next day in the San Diego County jail. The Court of Appeal held the statements made by respondent at this second interview were but a continuation of the first interview, there having been no discernible break in the chain of causation. (Opinion, at p. A-19.)

Petitioner impliedly argues that the Court of Appeal's opinion

took no cognizance of the California Supreme Court's ruling in *People* v. *May* (1988) 44 Cal.3d 309, which held that article I, section 28, subdivision (d) of the California Constitution eliminated judicially created state remedies for violation of self-incrimination rights that are not federally compelled. (Petition, at p. 35.) This, however, is not a fair appraisal of the California court's opinion. Indeed, the Court of Appeal's opinion expressly draws on one of our State Supreme Court's most recent discussions of "post non-*Mirandized*" admissions, namely *People* v. *Sims* (1993) 5 Cal.4th 405, thereby demonstrating its familiarity, as well as its compliance, with current state law. (Opinion, at p. A-19.)

In *Sims*, the California Supreme Court noted without objection the long-standing state rule that a subsequent confession may be presumed to have been tainted by an earlier non-*Mirandized* confession:

> "Previous decisions have acknowledged that where -- as a result of improper police conduct -- an accused confesses, and subsequently makes another confession, it may be presumed the subsequent confession is the product of the first because of the psychological or practical disadvantages of having '"let the cat out of the bag by confessing."' [Citations.]." (*Id.* at 444-445.)[7]

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[7] As even the State of California itself in its petition points out, "the fifth amendment prohibits the use only of *compelled* testimony, and failure to administer *Miranda* warnings **creates a presumption of compulsion**, requiring exclusion of the non-*Mirandized* statements. (Petition, at p. 33; citing *Elstad*, *supra*, at pp. 306-307; emphasis added.)

Accordingly, even under *Elstad*, the presumption of taintedness exists and to this degree, California law is wholly consistent with federal law. That presumption can, of course, be rebutted, as the Court of Appeal in *Pimentel* implicitly recognized by its reference to *People* v. *Sims*, *supra*, (1993) 50

Having acknowledged the presumption, the California Supreme Court then added the caveat that it does not however follow that such confessions may be "perpetually" precluded; i.e., confessions given after the circumstances for which the rule was created have ceased to exists will no longer be tainted:

> "Notwithstanding this presumption, 'no court has ever "gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."' [Citations.]" (*Ibid.*)

The Supreme Court in *Sims* thus concludes that "the foregoing presumption of taintedness is rebuttable, with the prosecution bearing the burden of establishing a break in the causative chain between the first confession and the subsequent confession." (*Ibid.*) Accordingly, the California Supreme Court holds, California requires that where a *Mirandized* statements follows a unlawful non-*Mirandized* statement, the government must demonstrate that there was a break in the causative chain between the two statements. Importantly, this is precisely the analysis undertaken by the *Pimentel* court and in doing so it found that the government had failed to meet this burden. On the contrary, the Court of Appeal in respondent's case held that there was no break in the causative chain:

Cal.4th 262. The Court of Appeal in *Pimentel*, however, found that the presumption had not been rebutted, for, it held, the subsequent *Mirandized* admissions were part of but one continuous, uninterrupted interrogation. In so finding, the Court of Appeal's holding is in line not only with California state law, but with federal law as well. Petitioner's claim to the contrary is insupportable.

> "The admissions and confessions which followed Pimentel's initial admission to being present at the 7-Eleven during the altercation that evening were inextricably connected to the first admission. The statements during the first day's taped interview were part of the same continuous interrogation conducted at the came location by the same officers. The second day's interview was but a continuation of the first. The taped post-*Miranda* admissions and confession were the product of the initial pre-*Miranda* custodial interrogation and were improperly admitted." (Opinion, at p. A-19.)

The Court of Appeal's opinion, therefore, petitioner's assertion to the contrary notwithstanding, is entirely consistent with this own Court's directives in *Elstad*, for there this Court likewise declared that the failure to administer *Miranda* warnings "creates a presumption" of compulsion, requiring exclusion of non-*Mirandized* statements. (*Oregon* v. *Elstad*, *supra*, 470 U.S. at 306-307.)

Furthermore, the analysis undertaken by the Court of Appeal in respondent's case here has been held by other California decisional authority to mesh squarely with the federal standard as specifically outlined by *Elstad*. In *People* v. *Celaya* (1987) 191 Cal.App.3d 665, for example, a noted California Court of Appeal decision, the court dealt with facts nearly identical to those of our case here and analyzed them under both the state and federal standard. Importantly, its analysis was the near mirror image of the *Pimentel* court's.

In *Celaya*, the defendant was read and then waived his *Miranda* rights immediately after making a non-*Mirandized* admission. The

court acknowledged that under federal law a subsequent warned statement is deemed not tainted by the uncoerced, unwarned statement. (*Id.* at 673.) Distinguishing the circumstances of *Elstad*, however, the Court of Appeal noted that the *Elstad* Court held that the circumstances in its case "had none of the earmarks of coercion . . . [n]or did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent." (*Id.* at 674; citing *Oregon* v. *Elstad* (1985) 470 U.S. 298, at 316.) The *Celaya* court also noted that "[t]he *Elstad* court limited its holding to the failure to administer *Miranda* warnings 'unaccompanied by an actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will . . . ." (*Id.* at 674; citing *Oregon* v. *Elstad*, *supra*, at p. 309.) The Court of Appeal in *Celaya* then concluded that even under the federal *Elstad* standard, the second admission was tainted and thus inadmissible; the *Mirandized* statements were tainted under either standard.

Significantly, the *Celaya* court's "federal" analysis is indistinguishable from the analysis undertaken by the *Pimentel* court. Just as in *Pimentel,* the *Celaya* court found the *Mirandized* statements to have been tainted by the first non-*Mirandized* admissions because:

> "In the instant matter, the second statement unquestionably flowed from and was inextricably connected with the first statement. The statements were part of a continuous interrogation occurring at the same location, conducted by the same officer, and uninterrupted in time." (*Ibid.*)

As noted, the Court of Appeal's analysis in *Pimentel* was virtually identical in reasoning and thus the *Pimentel* court cannot be said to have ruled contrary to federal law, unless, of course, the holding in *Celaya* was incorrect.

Moreover, respondent's case here can be distinguished further from the situation in *Elstad* in that respondent's non-*Mirandized* admissions, in contrast to those considered by this Court in *Elstad*, can by no means be characterized as uncoerced. To be sure, *Elstad* holds that where a first admission is obtained through coercion or "other circumstances calculated to undermine the suspect's ability to exercise his free will," the subsequent *Mirandized* admissions will be tainted: "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." (*Oregon* v. *Elstad*, *supra*, at p. 309.)

The Court of Appeal in *Pimentel*, by way of contrast, held that what brought respondent under the coverage of *Miranda* in the first place was the interrogating officers' lies communicated to him that they had videotapes of him and his car at the 7-Eleven and that they also had eyewitnesses who had positively identified him as being there. The lies, the Court of Appeal ruled, were clearly an "endeavor[ing] to extract a confession or admission from him." (Opinion, at p. A-17.)

Respondent's case was not, therefore, a case such as *Elstad*, where the defendant simply blurted out unsolicited admissions. On the contrary, the psychological "compulsiveness" in our case could not have been greater. Indeed, why else did the officers tell Pimentel the lies they told if not in a calculated attempt to undermine his free will, which, up to that point in time, had steadfastly denied any and all involvement in the homicide? And, of course, the California Court of Appeal so held -- and correctly so.

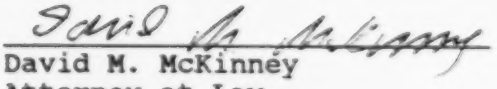
CONCLUSION AND PRAYER

The opinion of the Court of Appeal is a correct decision, properly applying principles of the California and United States Constitutions. It properly sets forth and applies the law in the area of "in custody" for purposes of *Miranda* and appropriately analyzes and resolves the question of whether respondent's non-*Mirandized* admissions tainted his subsequent *Mirandized* admissions.

Because this case presents no issue appropriate for the Court's review and because the lower court's holding was not in error, this Court should deny petitioner's Petition for Writ of Certiorari.

Dated: June 17, 1994

Respectfully submitted,



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No. 93-1844

IN THE SUPREME COURT OF THE UNITED STATES

FALL TERM, 1994

STATE OF CALIFORNIA, Petitioner

v.

GUSTAVO PIMENTEL, Respondent

RESPONDENT'S RESPONSE TO PETITIONER'S

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, DAVID M. MCKINNEY, a member of the Bar of this Court, hereby certify that on June 17, 1994, a copy of the Response to Petitioner's Petition for Writ of Certiorari in the above entitled case was mailed, first-class postage prepaid, to: Deputy Attorney General Pamela Klahn, California Attorney General's Office, 110 West "A" Street, Suite 1100, San Diego, California, counsel for petitioner herein. I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
JUL 5 1994
OFFICE OF THE CLERK

No. 93-1844

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GUSTAVO PIMENTEL,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BACKGROUND

The court below reversed Respondent's conviction for murder, holding that his statements to police should have been excluded. It held that Respondent had been subjected to custodial interrogation when he "became the focus of the investigation" during a non-Mirandized interview. The court further held that Respondent's subsequent Mirandized

statements should have been suppressed since they were the tainted product of the earlier non-Mirandized statements. App. A[1] at A-17, A-18.

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1. All references to App. A are to Appendix A as contained in Petitioner's Petition for Writ of Certiorari.

ARGUMENT

I

THE COURT IMPROPERLY FOUND RESPONDENT WAS SUBJECTED TO CUSTODIAL INTERROGATION BASED ON A SUBJECTIVE FACTOR

Respondent's opposition to the Petitioner's Petition for Certiorari is not supported by the record below. Respondent bases his opposition to certiorari on a mischaracterization of the facts and the court of appeal decision. Respondent's Brief in Opposition to Petition for Certiorari[2/] at 12.

While Respondent agrees that this Court's decision in Stansbury v. California (___ U.S. ___ (April 26, 1994) [U.S.L. Week 4279]) prohibits a trial court from considering for Miranda purposes an officer's subjective and undisclosed view concerning whether a

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2. Hereinafter cited as RBO

person being interrogated is the focus of an investigation, Respondent argues that the court of appeal decision is consistent with Stansbury. RBO at 12-13. Respondent claims that in finding he had been subject to custodial interrogation, the court of appeal "did not rely upon the subjective views of the interrogating officers at all, but rather on the fact that the investigating officers had demonstrably `disclosed' their suspicions to Respondent, `disclosed' being the operative term for the court's holding." RBO at 12. Thus, Respondent argues, the court found that he was "in custody" not because "the officers subjectively suspected petitioner [sic] of the homicide, but rather that the officers had communicated that suspicion to Pimentel "in no uncertain terms." RBO at 13, emphasis added.

In support of this claim, Respondent erroneously asserts in numerous ways and places throughout his brief that the court found him to be "in custody" when the officers "informed him they had hard, irrefutable evidence that he was involved in the homicide in question"[3] (RBO at 13-

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3. Examples of Respondent's mischaracterization of the basis for the court's ruling include:

> It was not what the officers believed but what they communicated to Pimentel that was determinative for the Court of Appeal, and what the officers effectively told him was that they had solid evidence that he was involved in the murder. It was only upon being given such information that the Court of Appeal believed a reasonable person, being told there was irrefutable evidence that he was a participant in the murder, would at that point, not have believed himself free to get up and leave the interrogation.

RBO at 14.

> It was at this point [when the officers falsely told Pimentel they had evidence he had been at the 7-Eleven], and only then, that the Court of Appeal found that the interrogation became `focused' and

> would have caused a reasonable person in Pimentel's situation to have believed he was not free to go, having just been told that the government had irrefutable evidence of his involvement in the homicide.

RBO at 18, emphasis added.

> "The nature of the interview changed, however, the California court expressly concluded, when the interrogation became much more focused and respondent was told by the officers that they had significant, if not conclusive proof of his involvement in the homicide."

RBO at 19, emphasis added.

> "It is clear, then, that the Court of Appeal considered it determinative that the officers communicated not merely their suspicions that he was involved in the murder, but that they informed him they had proof positive of his participation."

RBO at 20, emphasis added.

> "It would not be reasonable for a young Mexican boy to believe that after being told by police officers they had conclusive proof he was a murderer,. . ."

RBO at 23, emphasis added.

> "[W]hat distinguishes our case from Stansbury is that the officers in

14, emphasis added), when in fact the court never made such a finding.

Contrary to Respondent's assertions, however, and as the court of appeal decision makes abundantly clear, the court of appeal did not find Respondent to be in custody for Miranda purposes because of the officers' disclosed suspicions that he had been involved in the murder or because they told him they had evidence of his involvement in the murder.

As the court of appeal states in its opinion, the officers did not inform Respondent that they suspected him of the murder or that they had evidence he had been involved in the murder. They told him, albeit falsely, that they had a videotape of his car at the 7-Eleven

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> our case communicated in unequivocal terms their belief to respondent that he was a suspect, indeed, the suspect."

RBO at 17.

earlier on the night of the shooting[4]. App. A at A-7, A-17.

As the court held, "At this point we believe Pimentel ceased to be simply a source of general information, or even one of several possible leads, and became the focus of the investigation." App. A, A-17, emphasis added.

The court then concluded that after reviewing the totality of the circumstances[5], a reasonable man in Respondent's situation would have understood his freedom of movement had become so restricted that he was "in custody." App. A at A-18. Accordingly, the interrogation became custodial before

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4. The altercation occurred in National City about 10:00 p.m. at the 7-Eleven on 24th and Highland; the murder occurred after midnight at Coolidge and 16th Streets. App. A at A-3; A-5.

5. The setting at the police station, interrogation for 1-1/2 to 2 hours, and the use of false information. App. A at A-18.

Respondent was advised of his Miranda rights, the court held. App. A at A-18.

As the opinion makes clear, the court did not find Respondent to be "in custody" as a result of the officers' disclosed suspicions to Respondent that he had been involved in the murder. Rather, it found him to be "in custody" as a result of the police officers' subjective and undisclosed view that he was a suspect in the murder investigation. As this Court held in Stansbury, consideration of this factor is irrelevant to the assessment of whether a person is in custody for Miranda purposes. Stansbury, at 4279, 4281.

ARGUMENT

II

THE COURT IMPROPERLY FOUND THAT RESPONDENT'S MIRANDIZED STATEMENTS HAD BEEN TAINTED BY HIS EARLIER NON-MIRANDIZED STATEMENTS

Respondent's claim that the court of appeal's decision is consistent with Oregon v. Elstad, (470 U.S. 298, 309 (1985)), which held that a subsequent Mirandized statement is deemed not tainted by an earlier uncoerced non-Mirandized statement, is misplaced at best. RBO at 28, 29. Respondent bases this argument on a claim that his non-Mirandized statements "can by no means be characterized as uncoerced. RBO at 29.

In support of the claim that his non-Mirandized statements were coerced, Respondent relies solely on the court of appeal's finding that the police officers had falsely told him they had a videotape

of his car at the 7-Eleven[6/], which the court characterized as "an endeavor[ing] to extract a confession from him." RBO at 29. Respondent argues that this constituted "psychological compulsiveness (RBO at 30)," which he apparently equates with coercion.

Respondent has cited no authority for such a proposition, however, not surprising, since there is none. He also conveniently overlooks the trial court's finding that his statements were neither coerced nor involuntary. I RT 124.

Accordingly, it is abundantly clear that the court of appeal did not analyze the admissibility of Respondent's Mirandized statements under the Elstad

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6. Respondent also argues that the court found that the police had falsely told him "that they also had eyewitnesses who had positively identified him as being there [the 7-Eleven]." RBO at 29. However, nowhere in the court's opinion does the court make such a finding.

standard of voluntariness, but instead merely erroneously concluded that the statements were tainted by his earlier non-Mirandized statements.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Writ of Certiorari should issue to review the decision of the California Court of Appeal in this case.

DATED this 29th day of June, 1994

Respectfully submitted,

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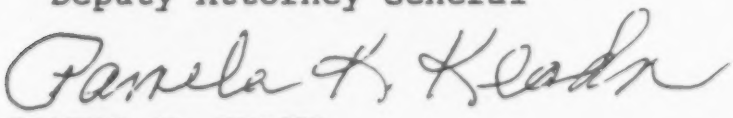

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No:
October Term, 1993

THE STATE OF CALIFORNIA,
Petitioner,

v.

GUSTAVO PIMENTEL,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICIES as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 1st day of July, 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 1, 1994.

Susie Denno
SUSIE DENNO

Subscribed and sworn to before me
this 1st day of July 1994.

Jean M. Burns
Notary Public in and for said County and State

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
THE COUNTY OF SAN DIEGO
My Commission Expires Sept. 17 1995